

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY ALLAN HUBBARD,

Defendant-Appellant.

UNPUBLISHED

January 25, 2007

No. 263300

Berrien Circuit Court

LC No. 2004-404393-FC

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third-felony habitual offender, MCL 769.11, to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the March 1999 shooting death of Raymond Davis. The crime remained unsolved for several years. In 2004, defendant's cellmate contacted the police and reported that defendant had bragged about committing the murder.¹ The police subsequently provided the cellmate with a digital recording device, and defendant allegedly confessed to the crime during a recorded conversation with the cellmate. The recorded conversation was played for the jury at trial.

Defendant first argues that defense counsel was ineffective for failing to have the digital recording analyzed before trial, failing to timely request the prosecutor's assistance in locating two missing witnesses, and failing to request a cautionary instruction concerning the limited use of other acts evidence. We disagree.

Because defendant did not raise this issue in a motion for a new trial or evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641;

¹ Defendant was serving a jail sentence for discharging a firearm toward a building, MCL 750.234b, at the time he made statements to his cellmate.

517 NW2d 858 (1994). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id.* at 314, 330. To establish prejudice, defendant must show that there is a reasonable probability that the result of the proceedings would have been different, but for the unprofessional errors of trial counsel. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In particular, whether to call an expert witness is a trial strategy decision. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). To overcome the presumption of sound trial strategy, the defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving the defendant of a substantial defense. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

During trial, defense counsel requested an adjournment so he could have the recording analyzed to determine whether the voice on the recording could be identified as defendant's voice. Counsel conceded that he made a serious error by failing to have the recording analyzed before trial. Thus, the first prong of the test for ineffective assistance of counsel is satisfied. However, defendant has not satisfied the prejudice prong. At trial, Thomas Altı of TGA Recordings testified that he was hired to enhance the quality of the recording by filtering out background noises. According to Altı, however, it was not possible to positively match the voice on the recording to defendant's voice. When defense counsel requested an adjournment, he informed the court that he had located two experts who *might* be able to analyze whether the voice on the recording was defendant's, but counsel admitted that he had not spoken to either. The court denied the request for an adjournment, but stated that it would reconsider its decision if counsel provided the court with more information. There is no indication in the lower court record that additional information was ever provided to the court. Additionally, defendant has failed to make any further showing that an analysis of the recording might demonstrate that the voice on the recording was not defendant's voice. Absent such a showing, there is no basis for concluding that further analysis may have made a difference in the outcome of the trial. Therefore, reversal is not warranted. *LaVearn, supra*.

Defense counsel also conceded at trial that he was remiss in waiting until just before trial to ask for the prosecutor's assistance in locating two missing witnesses, rather than requesting assistance at least ten days before trial as required by MCL 767.40a(5). However, the record shows that the anticipated testimony from the two witnesses would only have corroborated the testimony of other witnesses who already testified at trial. Because the witnesses' testimony would have been cumulative of other testimony that was presented, defendant has not demonstrated that the absence of the testimony deprived him of a substantial defense or that, but for this alleged error, the outcome of his trial might have been different. *LaVearn, supra; Pickens, supra*.

Lastly, counsel's decision whether to request a cautionary instruction was a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). In this case, defense counsel may have chosen not to request a cautionary instruction for strategic reasons. Furthermore, review of the record reveals that defendant repeatedly and deliberately introduced the other acts evidence. Defendant testified that he pleaded guilty to the discharge of a firearm charge because he committed the offense. He denied selling drugs in 1999, but admitted that he sold drugs in 2001. Defendant testified that he admitted guilt when he was guilty of the offenses; but he denied committing the murder and asserted that he was innocent of the charge and was being "railroaded." Based on the above, defendant has failed to overcome the presumption of sound trial strategy. Additionally, defendant concedes that this error, by itself, was not outcome determinative. In sum, defendant has failed to show that he was denied the effective assistance of counsel at trial.

Next, defendant argues that the trial court erred in denying his motion for a new trial. We disagree. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998). A new trial may be granted for any reason that would support reversal on appeal. See MCR 6.431(B).

Defendant first argues that a new trial was warranted because the trial court erroneously denied his request for an adjournment to allow the recording to be analyzed.

In deciding whether to grant a continuance, the trial court should consider whether the defendant: (1) asserted a constitutional right; (2) had a legitimate reason for asserting the right; (3) had been negligent; and (4) had requested previous adjournments. *People v Charles O Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Defendant must also show that he was prejudiced by the court's denial of his motion. *Lawton, supra* at 348; see also *Williams, supra* at 574-575.

In this case, defendant was asserting a constitutional right (to present a defense) and had a legitimate reason for asserting that right (his belief that the voice on the recording was not his, and counsel's failure to have the recording analyzed before trial). There is no indication of previous adjournments attributable to defendant. However, defense counsel admitted that he was negligent in failing to have the recording analyzed before trial. More importantly, defendant failed to come forward with any evidence that an analysis of the recording could demonstrate that the voice on the recording was not his. Because defendant cannot show that he was prejudiced by the trial court's denial of his motion for a continuance, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this basis. *Williams, supra*.

Defendant further argues that a new trial was warranted because the prosecutor did not exercise due diligence in attempting to find the two missing witnesses. We disagree.

With regard to the prosecutor's alleged lack of due diligence, defendant confuses the standard applicable to a finding that a witness is unavailable within the meaning of MRE 804, with the standard applicable to requests for assistance under MCL 767.40a(5). MRE 804(a)(5) requires a showing that the *proponent* of the evidence exercised due diligence in attempting to procure the missing witness's attendance. See *People v Bean*, 457 Mich 677, 683-684; 580 NW2d 390 (1998). Once that showing is made, the proponent can attempt to show that other

evidence (in lieu of the witness's testimony) should be admitted under one of the exceptions listed in MRE 804(b).

Conversely, under MCL 767.40a(5), a defendant is entitled to reasonable assistance in locating a missing witness. See *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). If the prosecutor fails to provide such reasonable assistance, the defense may be entitled to a missing witness instruction. See *People v Perez*, 469 Mich 415, 418-421; 670 NW2d 655 (2003).

In this case, defendant sought to introduce hearsay evidence (police reports) in lieu of the missing witnesses' live testimony. Thus, MRE 804(a)(5) initially applied, requiring a showing of due diligence. But defendant appears to have confused the two standards and, instead of evaluating whether *defendant* (the proponent of the evidence) exercised due diligence in attempting to procure the witnesses' attendance, the court and the parties addressed the question of whether the *prosecutor* exercised due diligence.² The prosecutor's efforts were relevant only to defendant's alternative argument that the trial court should give a missing witness instruction because the prosecutor did not provide sufficient assistance to locate the missing witnesses. Defendant repeats this error on appeal.

To the extent that defendant's argument can be interpreted as addressing MCL 767.40a(5), we conclude that defendant was not entitled to the prosecutor's assistance because he failed to make a timely request under the statute. Regardless, we are satisfied that the assistance provided by the prosecutor was sufficient to satisfy the prosecutor's burden under statute. Thus, defendant was not entitled to a missing witness instruction.

In sum, defendant has failed to show that the trial court committed an error that would warrant reversal. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Lemmon, supra*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

² On appeal, defendant does not argue that *he* exercised due diligence in attempting to find the missing witnesses, or that the hearsay police reports were admissible under any of the exceptions listed in MRE 804(b).